

FEDERAL-STATE RELATIONS IN THE MINING REGULATORY ARENA: PURSUING PRODUCTIVE PARTNERSHIPS

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I appreciate the invitation to participate in this year's Annual Conference of the National Association of Abandoned Mine Land Programs. I will be addressing the topic of pursuing productive partnerships in the context of state and federal regulation of mining—be it active operations or abandoned mine lands projects. My perspective will admittedly be as a state government regulator since my organization represents the natural resource and environmental protection interests of 20 Eastern, Midcontinent and Western member states. The Interstate Mining Compact Commission has served for over 30 years as a forum for action, discussion and information dissemination on any and all issues affecting minerals development within its respective member states. The Compact strives to act as a consensus builder, a strategy designer and implementer, and an effective advocate for the states' interests on mining matters. The states are represented by their Governors who serve as Commissioners and the Commission acts through various committees on which each of the member states are represented. Many of the states in attendance here today are members of the Compact and I appreciate your support and active involvement in our work. To the extent that you are unfamiliar with who we are and what we do, please do not hesitate to seek me out during or after the conference so that I can visit more with you. Our organization is open to all 50 states and I would be happy to discuss membership with those of you who are not yet members.

Now on to the matter at hand. Since the beginning of human existence, the earth's resources have played a vital role in the development of our society. Over time, rudimentary tools and weapons gave way to more sophisticated uses of the earth's resources, culminating in all of the necessities and luxuries that we use or enjoy today. All of humankind's advances have been tied to the development and utilization of the earth's resources, including energy, minerals, timber, and soils.

The industrial and agricultural revolutions that began in the 18th century and the scientific revolution of the 19th and 20th centuries provided the impetus for the rapid expansion and development of energy and mineral resources. The aspirations of the rapidly growing populations of developing nations, as well as the demand for necessities and luxuries consumed by the industrialized nations, require the continued availability of resources that are the basis of products and new wealth. We also have learned from past experience that these resources must be produced in a manner consistent with the protection of human health and safety and the environment.

While it may not be apparent to most Americans, it requires about 10 tons of nonfuel minerals, 76,000 cubic feet of natural gas, 25 barrels of oil and 4 tons of coal for every man, woman and child in the United States each year just to maintain our current standard of living. It is estimated that each American uses about 47,000 pounds of newly mined minerals per year. Energy from hydropower, nuclear power, wind power and other alternative energy technology is in addition to these numbers.

Obviously, these energy and mineral resources can only be produced where they have been deposited or made available by geological processes. Much of the undeveloped energy and mineral

resources occur on federal, state, and Native American lands located primarily in the western U.S. and Alaska. Significant undeveloped resources occur within the other states as well, as demonstrated by recent copper discoveries in New England and the revival of precious metals mining in the Carolinas in recent years. Construction and industrial minerals are being produced and utilized nationwide.

As we all know, development of resources often conflicts with other land uses. Earth- and nature-based religions and cultures of Native Americans may conflict with resource development on their lands. The proximity of resource lands to urban areas, national and state parks, wilderness areas, and developed recreation sites also affects their availability for development. Privately owned land is affected through local and regional zoning. The frequent separation of the surface and mineral estates, particularly in the case of private or fee ownership of the surface estate and the federal reservation of the mineral estate or mineral rights, have resulted in competing interests and often in litigation. Americans are concerned about the impact of resource development on the environment, including such areas as air and water quality, wildlife and endangered species.

A fairly recent article in "Mining Voice", the magazine of the National Mining Association, commented as follows: "The most common multiple-use activities on federal land include private-sector industries such as mining, timber harvesting, water usage, oil and gas leases and grazing. Popular recreational uses are boating, hunting, fishing, mountain biking, camping, dirt biking and off-road driving. Government agencies also manage cultural resources, archeological sites, wild horse populations, real estate transactions, easements and rights-of-way. As more people use federal lands for recreation, multiple-use issues become more complicated." In all of these scenarios, the key is to balance the growing demands of the public for more recreational space with the more traditional uses of commodity extraction and mining.

As a result of the competing interests associated with multiple-use management, the making of informed, credible decisions at the state and federal executive and legislative levels is more important now than ever before. We have all likely faced the criticism that resource development decisions are being made by politicians and government officials who are influenced by the NIMTO syndrome (i.e. not in my term of office) as a result of pressure by the NIMBYs (not in my backyard) and the POTPEs (people opposed to practically everything) and the BANANAs (build absolutely nothing anywhere near anything). In commenting on this regulatory decision-making conundrum, a former state regulatory official and IMCC representative who now works for the Colorado School of Mines stated as follows:

Ideally, a regulatory program should foster the activity that it regulates in a manner that will optimally benefit the public (i.e. those engaged in the activity and the state's citizens) in a manner consistent with proper protection of public health and safety as well as protection of the environment. For such programs to become reality requires that legislators and officials of the executive branch of government act as true public servants C that they recognize their subservient role to the public and its best interests. Statutes and regulations adopted in the guise of regulating an activity but which in reality were designed to prevent such activities do not constitute a regulatory program; instead, they are confiscatory, denying the public the benefits it deserves. Vociferous special interest groups on various sides of an issue too often exert all of the pressure they can muster to confuse decision makers with emotion and misinformation. Knowledge and integrity are the defenses against such

pressures, and legislators and administrators possessing both will produce regulatory programs that can truly serve the public.

(“Resource Development in Today’s Environmental and Political Climate”, by Erling Brostuen, Energy and Minerals Field Institute, Colorado School of Mines, Environmental Geosciences, Vol. 4, No. 1, pp. 29 - 36.)

Where does this leave us? As regulatory authorities within our respective areas of jurisdiction and spheres of influence, we must make some sense out of the multiple-use management dilemma in our attempt to balance the use and protection of natural resources and the interaction between the mining industry, government and society. I would like to focus on one practical way of responding to this sometimes elusive regulatory quagmire: pursuing productive partnerships through intergovernmental cooperation, coordination and consensus-building. Then I want to conclude with a couple of perspectives about public education and regulatory reinvention.

As we might expect under regulatory programs that grow out of national environmental laws like the Surface Mining Control and Reclamation Act (SMCRA), the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA), there is a fairly high level of interaction (some would say “friction”) between the states and the federal government. Primarily this is based on a formula in these statutes whereby the states are authorized to take the lead for regulating in a particular area (i.e. water quality, surface coal mining operations, landfills) upon federal approval of a state plan or program. The federal government then accedes to an oversight role in which it monitors the progress of the states without interfering in day-to-day implementation matters.

A federal appeals court in Richmond recently had an opportunity to address “the carefully designed balance that Congress established between the federal government and the states” in the context of a lawsuit brought by a citizens group challenging West Virginia’s handling of permits related to mountaintop mining and valley fills. The court found that the effect of a citizen suit to require officials in a primacy state to comport with the federal provisions establishing the core standards for surface coal mining would end the exclusive state regulation and undermine the federalism established by the Surface Mining Act. The court went on to delineate the role of the states vis-a-vis the federal government under SMCRA:

While it is true that Congress’ desire to implement minimum national standards for surface coal mining drives SMCRA, Congress did not pursue, although it could have, the direct regulation of surface coal mining as its preferred course to fulfill this desire. Nor did Congress invite the state to enforce federal law directly. By giving states exclusive regulatory control through enforcement of their own approved laws, Congress intended that the federal law establishing minimum national standards would “drop out” as operative law and that the state laws would become the sole operative law. Thus, all of the federal provisions establishing the minimum national standards are not directly operative in West Virginia so long as it remains a primacy state.

The reality of the situation, as we all know, is often quite different from the theoretical state primacy approach contained in the statutes. In the best of times, the federal/state interaction that occurs on an almost daily basis sometimes leads to duplication and confusion; in the worst of times, the tension that attends the intergovernmental balancing act can be almost debilitating. We have found that concerted efforts to foster intergovernmental cooperation, coordination and consensus-building have paid incredible dividends. Not only do we function more as partners than competitors (thus accomplishing more and avoiding duplication), but we also gain a measure of credibility and integrity among those we regulate and protect. In this regard, I wholeheartedly endorse recent remarks by Secretary of Interior Gale Norton where she emphasized the need for “consultation, cooperation and coordination in order to achieve effective conservation.” The four “C’s” I have advocated over the years are very similar: cooperation, coordination and communication in order to achieve consensus, regardless of the issue.

Admittedly, there will always be those who believe that there is something incestuous and inappropriate about state and federal government agencies working too closely together. However, this tends to reflect a desire by some groups to be able to leverage one government agency against another, rather than a substantive argument against intergovernmental cooperation. Besides, we have seen that a federal agency can work closely with its state counterpart and still retain a significant and meaningful oversight authority. The 900 pound gorilla seems to be alive and well when needed.

Among the areas where IMCC has seen significant results from intergovernmental cooperation are coal remining, the design of a federal oversight program for state surface mining programs, the Clean Streams Initiative within the Office of Surface Mining, the Acid Drainage Technology Initiative, increased funding for states to reclaim abandoned mine lands, a state/federal initiative to review and improve coal data reporting requirements and forms, a state/tribal/federal effort to address mine placement of coal combustion wastes and, most recently, a state program benchmarking effort sponsored by IMCC. In each of these cases, the states have approached our federal counterpart (be it the Office of Surface Mining in the Interior Department, the U.S. Environmental Protection Agency, or the Mine Safety and Health Administration in the Labor Department) and suggested a cooperative approach for resolving shared issues or problems. The results to date have been remarkable and encouraging.

The work of an OSM/State team on federal oversight was recognized by former Vice President Gore’s office with a Hammer Award for its efforts to reinvent the way we operate as governments. Pursuant to the new oversight approach, the states’ performance in implementing their programs is evaluated based on an assessment of the success of their respective programs on-the-ground, rather than the mere bean-counting approach of the past.

The coal remining initiative has resulted in the promulgation of a final rule this year that removes a significant disincentive that has stood in the way of cleaning up abandoned coal mine sites that often contain acid mine drainage. These sites will likely never be approved for funding under the Abandoned Mine Land Fund, so remining is the only hope for remediation. In a related effort, the Acid Drainage Technology Initiative has brought together the states, federal government and academia to identify proven technologies that will reduce or even eliminate the formation of acid pollutants associated with current and past mining practices.

Last year, IMCC initiated an intergovernmental forum on the mine placement of coal combustion wastes (CCW). This topic was recently addressed in EPA's 1999 Report to Congress and again in EPA's 2000 Regulatory Determination regarding CCW. The result of the forum was an agreement to pursue cooperative and coordinated discussions and actions regarding the regulation of mine placement of coal ash based on current state regulatory programs and perceived gaps that may exist. In April, I presented an overview at OSM's Technical Interactive Forum on Coal Combustion By-Products in Golden, Colorado where I reported on the significant progress we have made to date. Most promising of these efforts was our most recent state/federal meeting in April where EPA presented a draft report on "Minefill Regulatory Concerns" which assesses the potential gaps that exist in current state regulatory programs vis-a-vis EPA's analysis of federal regulatory requirements pursuant to subtitle D of RCRA. For the first time, the states have a clearer idea of where EPA is coming from and, based on our discussions with them, EPA has a better understanding of how our existing regulatory programs (both coal and noncoal) address these concerns. Next steps in the process call for the states to develop a more detailed analysis and presentation of how our existing SMCRA and RCRA state programs line up with EPA's concerns. The end outcome should be a bridging of the gap between where EPA and OSM believe we must go and how the states are either positioned to go there or can accommodate their concerns. In the final analysis, we hope to reach a consensus that avoids the need for unnecessary, duplicative national regulations and that recognizes the comprehensive state programs already in place for effectively regulating mine placement of CCW.

Another recent state/federal initiative that is showing signs of promise is an effort begun last summer by IMCC, MSHA, the Energy Information Administration in the Department of Energy and the Internal Revenue Service to review the potential for redesigning existing coal reporting forms that are used by state and federal agencies in an effort to ease the reporting burden on industry and to coordinate our individual collection efforts and responsibilities. We hope to agree on either a common reporting format, develop common reporting terms and protocols, or forge an agreement about which agency collects what information and data and how this can then be shared and relied upon by all other agencies. OSM has gathered all of the reporting forms together into a single document and provided an overview of the reporting requirements and accompanying statutory authorities. The states have prepared a matrix that analyzes these forms and requirements. OSM is currently pursuing the potential of coordinating the coal reporting form efforts as part of the Small Business Administration's One-Stop Compliance Quicksilver Initiative, which would provide additional funding for the project.

Another topic I want to touch on is IMCC's recent state program benchmarking initiative. Over the past year, IMCC has been working with OSM to advocate a prototype state program benchmarking workshop together with a seminar on current and emerging strategic and performance management techniques. IMCC believes that the future of state regulatory program improvement and enhancement lies as anticipated by SMCRA B in this effective management tool, whereby states share their regulatory experience and expertise on a particular topic as a sort of benchmark by which other states and OSM can measure their respective programs and performance. The end product is a means by which everyone benefits in terms of program improvement. Our recent prototype benchmarking workshop focused on probable hydrologic consequences (PHC's) and cumulative hydrologic impact assessments (CHIA's) and was held from March 12 - 14 in New Orleans. A total of 58 state and tribal representatives attended the

workshop, 13 of whom served as either presenters or facilitators. A total of 22 persons from OSM also attended the workshop. The program received very high marks from the participants based on an evaluation form that was distributed to all attendees. Pursuant to a contract with OSM, IMCC was able to reimburse 50 state and tribal representatives for their travel expenses to attend the workshop.

The benchmarking workshop lasted two days and was followed on the third day by a seminar entitled "Interactive Working Session regarding Program Effectiveness; Redesigning Program Structures; and Aligning Resources to Achieve Program Outcomes/Results." The seminar was conducted by Carl DeMaio of the Performance Institute, who had previously facilitated several sessions for stakeholders concerning the Interior Department's Strategic Plan for FY 2003 and beyond. The seminar was also well received and provided participants with an opportunity to engage in several strategic planning exercises directed at the PHC/CHIA process. Based on the success of both the prototype benchmarking workshop and the strategic planning seminar, IMCC has submitted a proposal to OSM seeking funds for additional benchmarking opportunities and related seminars. Under the proposal, IMCC would sponsor two additional benchmarking sessions and/or seminars over the next two years. Funding would cover IMCC administrative expenses and travel for state and tribal participants. Among the topics that could be addressed at the workshops/seminars are bonding; water use and quality; subsidence; public participation and handling of citizen complaints; state self-audits; and performance measurement/management. In a related matter, IMCC has worked with OSM in coordinating a series of workshops on the development of performance measures for both the Title V and Title IV programs, both of which were held in August.

I would now like to address very specifically some of the challenges that I see facing the AML program in the coming months and years. Our most important initiative will be legislative action to amend Title IV of SMCRA, which is likely to see concerted attention in the 108th Congress convening in January of 2003. Several legislative attempts were made in the current Congress to address Title IV, most of which were motivated by the fact that the authority to collect the per ton fee levied on coal production, which serves as the funding mechanism for the AML Trust Fund, is set to expire on September 30, 2004. However, due to a variety of factors, no substantive amendments are expected in the 107th Congress. This puts the pressure on the next Congress, which must act or the fee collection authority will terminate.

It will be incumbent on the states, as the primary delivery mechanism for Title IV reclamation moneys, to be a key player in these legislative debates as we have throughout the 107th Congress. Not only will the states need to continue their close working relationship with OSM and with Congressional staff, but we will need to forge effective partnerships with other interested and affected agencies and organizations. Among these are national and local citizen groups, the mining industry, and several federal agencies who are relatively new entrants to the AML remediation initiative due to recent congressional funding for their programs. These federal agencies include the Bureau of Land Management, the National Park Service, the Environmental Protection Agency and the U.S. Army Corps of Engineers. Although these agencies have little to do with reauthorization of Title IV of SMCRA, they are competing for the same limited dollars as the states when it comes to AML remediation efforts. Thus, it will be important for the states to clarify the roles that are played by the states and the federal government under the various authorizing statutes and funding schemes. In particular, it will be critical for the states to emphasize the 25 years of experience and expertise that we have developed with the implementation of effective and efficient

AML programs and why it is vital for the states to remain the primary delivery mechanism for these services in order to avoid duplication of effort and wasted resources.

Under the circumstances, there is probably no other state/federal initiative that is as dependent on the pursuit of productive partnerships than the future of the AML program. There are myriad interests, issues and considerations from a regulatory, policy and political perspective that must be reconciled and resolved before a final solution is reached. By working with all interested and affected parties, the states will be better positioned to advocate their views and protect their interests, with the overall objective of serving their constituents by assuring protection of public health and safety, environmental restoration, and economic development in the coalfields of America.

In each of the cases presented above, the key to success has been (or will continue to be) a coordinated effort based on a cooperative attitude focused on consensus solutions to common problems. This type of approach for implementation of regulatory responsibilities seems tailor-made for the area of multiple-use management and balancing resource use where industry, the government and society all have a stake in the eventual outcome. Instead of competing for jurisdiction and authority, thereby sending confusing and contradictory signals to our constituencies, we are able to implement programs of integrity and consistency and gain the public's trust and confidence in our decision-making and policy choices.

Our efforts in this regard will be complemented by some of the on-going efforts to reinvent government, and the way we operate as governments. One initiative in particular, labeled "A New Environmentalism", holds great promise from my perspective. This initiative calls for new partnerships between citizens, the private sector, communities, and federal, state and local governments to achieve the next generation of environmental benefits. "New Environmentalism" identifies four basic principles for improving environmental policy and the environment itself: 1) nurture the creativity and problem-solving capacities of state and local officials and ensure accountability for environmental results; 2) encourage a more flexible performance and compliance-based management of the environment; 3) harness environmental entrepreneurship like "private stewardship" and "green business practice" with incentives; and 4) emphasize honesty, integrity and balance in environmental decision-making by acknowledging science as crucial to good decisions. Many of these goals are reflected in the above-described activities that are already taking place between the states and OSM and EPA. They are also contained in the Enlibra Principles adopted by the Western Governors' Association some years ago and that now serve as the basis for governmental action and decisions affecting the environment. Among other things, Enlibra encourages resolving environmental problems through consensus by employing the notion that people working together can create jobs and protect the environment. We will be looking for new and expanded opportunities like these in the future.

A final key component of the overall picture regarding balancing resource use and protection that I want to briefly touch on is education. IMCC has recently undertaken a minerals education program in an effort to play a role in the overall effort to inform the public about the importance of minerals and the impacts associated with their development. As Erling Brostuen has noted in his article on Resource Development: "People in today's society make little connection between commodities considered necessities and luxuries and the source of the materials that have gone into their manufacture. A collective

ignorance is manifested in the continued portrayal of the extractive resource industries as irresponsible corporations and individuals intent on destroying the environment for monetary return. Many in our society do not or refuse to recognize that we are all consumers of natural resources and that the only reason such resources are extracted is to satisfy our demand for food, shelter, energy, automobiles, refrigerators, and the like. Society's understanding of the social, economic, and environmental benefits of the extractive industries to the community, state or region is unfortunately extremely limited." (Pages 33-34)

One of our objectives at IMCC is to inform and educate the public about natural resource development issues associated with mineral extraction, including our role as state regulators. We believe that an informed public will be better able to understand the need for minerals and the importance of attempting to balance the development of our mineral wealth with the protection of other resources like air, water and land. This process of education must begin at an early age and hence we are focusing on teaching teachers about mineral resources, since they are the key to the minds of tomorrow's decision makers and constituents. We have seen repeatedly that an investment of time, energy and money in the educational arena will pay dividends when the time comes for rational, informed decision making.

What are the challenges facing government, industry and society at large concerning multiple-use management in the mineral resource arena in the future? Among the issues we are working on, besides those mentioned above, are adequate funding for state AML reclamation grants; impacts from subsidence on dwellings and water supplies; mountaintop removal and valley fills; protection of significant historic and archeological properties; bonding for acid mine drainage and other long-term mining impacts; viewsheds associated with mining activity; blasting practices; effective handling of citizen complaints; and reforestation and other postmining land use opportunities. I am convinced that the productive partnerships I have discussed with you today contain lessons and options that are applicable to these new challenges. It will be incumbent upon us as regulators to choose the best and most promising approaches as we seek to balance the use of our abundant natural resources with the required protection and preservation. Much of this transcends political parties and Administrations and serves as an example of how we can best manage our resources, particularly where sustainable development is an overall goal. In the end, multiple use applied honestly and with integrity will ensure the responsible management of our natural resources, which will in turn supply the raw materials, energy, food and recreation for our ever-expanding society. And the partnerships we pursue and produce today will serve to advance these goals and will reap benefits well into the future.